

APPELLATE COURT NO. 71595
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS
AT AUSTIN

RICK ALLAN RHOADES,

Appellant

VS.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM 179TH DISTRICT COURT OF HARRIS COUNTY,
TEXAS

Judge J. Michael Wilkinson Presiding

STATEMENT OF FACTS

VOLUME XX OF 40 VOLUMES

Marlene Swope
Official Court Reporter
301 San Jacinto
Houston, Texas 77002

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INDEX

VOLUME XX

VOIR DIRE EXAMINATION OF PROSPECTIVE JURORS

GENERAL VOIR DIRE EXAMINATION OF THE PANEL

	<u>Page</u>
BY THE COURT	2562
BY THE STATE	2614
BY THE DEFENSE	2644

1 CAUSE NO. 612408

2 STATE OF TEXAS IN THE 179TH DISTRICT COURT

3 VS. OF

4 RICK ALLAN RHOADES HARRIS COUNTY, T E X A S

5
6 A P P E A R A N C E S:

7 For the State: Ms. Carol Davies
8 Assistant District Attorney
Harris County, Texas

9 For the Defendant: Mr. James Stafford
10 Ms. Deborah Kaiser
11 Attorneys at Law
Houston, Texas

12
13 BE IT REMEMBERED that upon this the
14 24th day of August A.D. 1992, the above entitled
15 and numbered cause came on for continued voir
16 dire examination of prospective jurors before
17 the Honorable J. Michael Wilkinson, Judge of the
18 179th District Court of Harris County, Texas;
19 and the State appearing by counsel and the
20 Defendant appearing in person and by counsel,
21 the following proceedings were had, viz:
22
23
24
25

1 (Panel of prospective jurors seated in
2 the courtroom)

3 VOIR DIRE EXAMINATION BY THE COURT.

4 Welcome back, ladies and gentlemen.
5 We are going to get started in the selection
6 process this afternoon. I am going to be
7 speaking to you for about forty minutes or so,
8 maybe less, if you are lucky. Once I get
9 through, we will turn it over first to the state
10 and then to defense counsel. For the most part,
11 we are doing this on automatic pilot about now.
12 I told you this is our fifth week going through
13 this process of bringing prospective jurors over
14 here in panels, talking to you, assessing your
15 qualifications, re-scheduling you, bringing you
16 back for individual selection. This is a
17 capital murder case; so, therefore, we are
18 entitled to have individual voir dire,
19 individual questioning of the jurors. We won't
20 be questioning you on an individual basis as
21 long as there is an entire panel here; we bring
22 you back one at a time. Sometimes that process
23 takes ten or fifteen minutes, sometimes it takes
24 two hours that one of you is on the witness
25 stand while we ask you questions, checking your

1 qualifications.

2 I know that you have all been
3 technically qualified to serve as jurors across
4 the street. I need to ask now whether or not
5 there is anybody who can't sit on this jury for
6 any particular reason. I am going to tell you
7 what I mean by that. We know exactly when we
8 are supposed to start testimony in this case.
9 As I said before lunch, it's Monday, September
10 28th, probably about ten, 10:15 a.m. on that
11 day. We have other things scheduled in the
12 interim. I have a visiting judge in my
13 courtroom trying cases on a regular basis. We
14 have other matters than just this capital murder
15 case we are involved in right now, so we gave
16 ourselves plenty of lead time to get a jury in
17 this case and handle our motions in this case
18 prior to September 28th, but that is our
19 anticipated starting date. Right now, I don't
20 see anything that could change that at all.
21 When we start trial, while I might anticipate
22 this case is going to be tried in a week, I am
23 asking everybody to block out two weeks because
24 I never know what is going to happen once we get
25 started. I don't know how long it's going to

1 take a jury to deliberate a case once they get
2 it and go back to the jury room and begin their
3 deliberations, so we are asking everybody to
4 block out a maximum of two weeks beginning
5 Monday, September 28th. Having heard that, I am
6 going to be asking you in a couple of moments if
7 there is any reason you need to bring anything
8 to our attention as to why you could not sit as
9 a juror beginning September 28th. I am not
10 asking if you are self-employed. I am not
11 asking if it's a financial hardship for you to
12 be on jury service. It is for most people. I
13 am asking such things as: Are you on dialysis?
14 Do you have surgery scheduled on September
15 25th? Is your son or daughter getting married
16 in California on September 29th and you would
17 like to be there? Do you have prepaid,
18 nonrefundable plane tickets for that
19 once-in-a-lifetime trip to Paris leaving on
20 Monday morning, September 28th? Those are the
21 kinds of things I am asking about.

22 Having heard that, is there anybody on
23 this panel who has any particular reason, any
24 special reason you need to bring to my attention
25 why you could not sit as a juror in this case?

1 One hand, two hands. I am not going to give you
2 much more time to think about it. On the third
3 row, that is number thirteen and fourteen.
4 Could you come up, sir?

5 (Prospective juror James A. Y'Barbo
6 approached the bench, and the following
7 proceedings were had:)

8 THE COURT: This is prospective juror
9 number 13 on panel number 5, Mr. James Allen
10 Y'Barbo.

11 What did you need to tell us?

12 THE PROSPECTIVE JUROR: I am the
13 corporate controller for Apple Tree Markets. We
14 have a bankruptcy hearing scheduled on the 29th;
15 and during that next week we have a confirmation
16 date of probably the 12th.

17 THE COURT: Where is it being heard?

18 THE PROSPECTIVE JUROR: Here in
19 Houston. I am not sure I am going to be in
20 that, but I am heavily involved in preparing all
21 the schedules and kind of on standby to be there.

22 THE COURT: Have you been subpoenaed?

23 THE PROSPECTIVE JUROR: No, I have not.

24 THE COURT: You are preparing
25 documentation; is that what you are doing?

1 THE PROSPECTIVE JUROR: Yes.

2 THE COURT: Have you been through this
3 before?

4 THE PROSPECTIVE JUROR: I have
5 testified early on in some preliminary hearings.

6 THE COURT: Just in your capacity as
7 controller?

8 THE PROSPECTIVE JUROR: Yes.

9 THE COURT: Any questions at this
10 point?

11 MR. STAFFORD: Would they issue a
12 subpoena for you if they knew you were--

13 THE PROSPECTIVE JUROR: No, they don't
14 issue subpoenas in bankruptcy court. Usually
15 you are there and available.

16 MR. STAFFORD: What would happen if
17 you didn't show up?

18 THE PROSPECTIVE JUROR: Well, the
19 judge has said--

20 MR. STAFFORD: Issue a warrant for me?

21 THE PROSPECTIVE JUROR: That is a
22 thought.

23 THE COURT: Have a seat. We may ask
24 you some questions later on.

25 (Prospective juror Charles H. Vervalin

1 approached the bench, and the following
2 proceedings were had:)

3 THE COURT: This is prospective juror
4 Charles H. Vervalin.

5 THE PROSPECTIVE JUROR: I have
6 nonrefundable airline tickets to Colorado
7 leaving the 21st.

8 THE COURT: Returning when?

9 THE PROSPECTIVE JUROR: A week later,
10 about eight days.

11 THE COURT: Do you know for sure when
12 it returns?

13 THE PROSPECTIVE JUROR: The eighth
14 day.

15 THE COURT: On our next break, is
16 there someone you can call to verify?

17 THE PROSPECTIVE JUROR: Yes.

18 THE COURT: Is it with Continental?

19 THE PROSPECTIVE JUROR: Yes, sir.

20 THE COURT: How many people are going?

21 THE PROSPECTIVE JUROR: Just my wife
22 and I.

23 THE COURT: And y'all have vacation?

24 THE PROSPECTIVE JUROR: That's right.

25 THE COURT: Any questions?

1 MR. STAFFORD: No, sir.

2 THE COURT: We may ask you questions
3 later on.

4 (Before the panel)

5 THE COURT: If at any time during the
6 course of this proceeding, you suddenly realize
7 you do need to bring something to our attention,
8 please raise your hand and let us know at that
9 time. It would be appropriate at anytime while
10 I am talking to you or either of the parties in
11 this case. Don't just sit there silently on
12 some information because we do need to know some
13 of these things. It's helpful, particularly
14 later on today when we are going through the
15 list and asking ourselves who we want to have
16 brought back later on in the week.

17 After I get through talking to you,
18 each side is going to be asking you some
19 questions. They are, for the most part, going
20 to be asking questions of the entire array.
21 Sometimes they will have to assume by your
22 silence what your answers, so you do need to
23 speak up so they don't assume by your silence
24 incorrectly. Sometimes they will ask the
25 entire panel, sometimes row by row. Generally,

1 at this stage, we aren't going to be asking
2 individual questions. That will come later.
3 Once both sides have talked to you -- and we
4 will take a break, in case you are wondering, in
5 about an hour and fifteen minutes or so -- we
6 will send you out of the room, we will get
7 together, the parties will talk to each other
8 and make a determination of exactly which ones
9 and how many are going to be brought back for
10 individually questioning. When you come back
11 for individual questioning, we usually bring in
12 a couple of people in the morning and perhaps
13 three people in the afternoon and you do sit
14 here for a while, or sit in the anteroom for a
15 while, so you need to bring reading material
16 with you at that time because, as I said
17 earlier, sometimes it takes ten or fifteen
18 minutes and sometimes it's a couple of hours
19 when we are talking to an individual.

20 I am getting weather bulletins up
21 here. If you have your weather charts out
22 there, it's latitude 25 north, longitude 82
23 west at one p.m. West/northwest. So that is
24 more of that north stuff. Not expected to come
25 to Houston; however, we are expecting five to

1 eight inches of rain. Is that today?

2 THE CLERK: No, Wednesday.

3 THE COURT: I don't know how can they
4 can tell that two or three days in advance, but
5 we will keep you posted, as they say.

6 Okay. Once we schedule you, we will
7 bring you up here and give you little slips and
8 tell you exactly where to go and what time to
9 return. Some of you will be released for all
10 purposes; some of you will be asked to come
11 back. On whatever date that you come back in
12 here and we question you individually, when you
13 get off that stand we will let you know at that
14 time whether or not you are selected to serve on
15 the jury. If not, you go about your business.
16 If you are selected to serve, we will give you
17 some additional instructions, some admonitions,
18 some more paperwork and tell you exactly when to
19 be back here and where to report on September
20 28th for jury service. We have already selected
21 nine jurors in this case. We are only looking
22 for three more good men and women and one
23 alternate, as they say.

24 When we start testimony on September
25 28th, State will go first. The defendant will

1 be arraigned in your presence, a plea will be
2 entered. State goes first because they have
3 the burden of proof. They will go first in the
4 jury selection process. They will go first in
5 calling witnesses to the stand. They will go
6 first and last in arguing the case to you. At
7 some point, the State will rest. The defense
8 has the opportunity, they don't have to go
9 forward at that time, but they have the
10 opportunity to go forward. They may call
11 witnesses to the stand. If they do not choose
12 to do so, they don't have to. They don't have
13 to call the defendant to the stand. The State
14 can not call the defendant to the witness
15 stand. At some point, the defense will rest.
16 Both sides will have the opportunity to have
17 rebuttal. They will rest and close. At that
18 point, I will prepare the Court's Charge. That
19 is a multi-page, typewritten instrument which I
20 will read to you. It's going to contain all the
21 law and all the definitions you need to know
22 when you go back to deliberate this case. The
23 case will be argued to you by both sides. You
24 go back and deliberate. You return a verdict of
25 guilty or not guilty. In any criminal case, if

1 a jury returns a guilty verdict, there is a
2 second stage of trial. We will call that the
3 penalty stage or the punishment stage. That is
4 the stage where you most often hear testimony
5 regarding a defendant's background, character,
6 reputation, prior bad acts, previous criminal
7 convictions, if any exist, that kind of thing,
8 the kind of information most jurors find helpful
9 when they are determining what the appropriate
10 punishment should be. I prepare another charge;
11 it's argued to you; you go back and you
12 deliberate in the second stage of trial. That
13 is basically what happens in any criminal case.

14 I need to see if there is anybody here
15 who knows anything about the case that we are
16 going to be hearing. Now, I don't know very
17 much about the facts of this case. I am not
18 going to allow either side to tell you what they
19 anticipate the facts are going to be. You get
20 to hear what happened in this case at the same
21 time that I do, and that is when you are seated
22 in the jury box with eleven other jurors.

23 Is there anybody on this panel who
24 lives in Pasadena? I can't see all of you.
25 Anybody here who lives in South Houston? That

1 is fairly consistent with the other panels we
2 have had. It is my understanding that the
3 offense in this case occurred on or about
4 September 13, 1991, on Keith Street, K-e-i-t-h,
5 in Pasadena. The complainants deceased both are
6 Charles Allen and Bradley Dean Allen. It's my
7 understanding that those two people are
8 brothers.

9 Having heard that information, is
10 there anyone here who thinks you recognize the
11 case that I am talking about? One hand. Any
12 other hands? I will get back to you in just a
13 moment.

14 Let me introduce the principals
15 involved in this case. The defendant is Mr.
16 Rick Allan Rhoades.

17 Would you, please, stand up, sir? You
18 might have to move to the other side of this
19 post.

20 He is represented by Mr. Jim Stafford
21 and Ms. Deborah Kaiser.

22 The State of Texas is represented by
23 an assistant district attorney, Ms. Carol
24 Davies.

25 Is there anyone on the panel who

1 recognizes any of these participants? On the
2 back row? Who do you think you recognize?

3 THE PROSPECTIVE JUROR: (Indicates)

4 THE COURT: Ms. Davies?

5 THE PROSPECTIVE JUROR: Yes.

6 THE COURT: Can you tell me where you
7 think you recognize her from?

8 THE PROSPECTIVE JUROR: A young man
9 that I more or less adopted has been in your
10 court.

11 THE COURT: Could you come up, please?

12 (Prospective juror Eileen Pfau Adams
13 approached the bench, and the following
14 proceedings were had:)

15 THE COURT: This is prospective juror
16 number 21 on panel number 5, Ms. Eileen Adams.
17 Who was it?

18 THE PROSPECTIVE JUROR: Mark Walzer
19 has been in your court.

20 THE COURT: The name is vaguely
21 familiar.

22 THE PROSPECTIVE JUROR: He should be.

23 THE COURT: Tell me why.

24 THE PROSPECTIVE JUROR: Well, you put
25 him in boot camp, and he is just about ready to

1 get out, which is good.

2 THE COURT: Did he have a
3 co-defendant?

4 THE PROSPECTIVE JUROR: No.

5 THE COURT: What was he charged with?

6 THE PROSPECTIVE JUROR: Theft was the
7 last one. It goes back many years. He had
8 theft and then he had, of an automobile, and
9 probably about -- I can't remember now.

10 THE COURT: Did you come to court with
11 him?

12 THE PROSPECTIVE JUROR: Oh, yeah.

13 THE COURT: Was he on bond or in
14 custody?

15 THE PROSPECTIVE JUROR: He is in
16 custody.

17 THE COURT: Was he, when you came to
18 court with him, in custody?

19 THE PROSPECTIVE JUROR: In custody.

20 THE COURT: Who represented him?

21 THE PROSPECTIVE JUROR: Elaine Shaw.

22 THE COURT: How long ago was this?
23 Must have been three or four--

24 THE PROSPECTIVE JUROR: Yeah, because
25 he graduates Wednesday.

1 THE COURT: Did he live with you prior
2 to the time?

3 THE PROSPECTIVE JUROR: For a short
4 period of time, yes.

5 THE COURT: Do you recognize Ms.
6 Davies from the courtroom?

7 THE PROSPECTIVE JUROR: Yes. Both of
8 you from the courtroom.

9 THE COURT: You were there the day the
10 plea was entered?

11 THE PROSPECTIVE JUROR: Yes, sir.

12 THE COURT: You realize there are
13 dozens and dozens, so I can't remember.

14 THE PROSPECTIVE JUROR: Yes.

15 THE COURT: Is there anything about
16 that experience regarding Mr. Walzer that would
17 cause you to be biased or prejudiced one way or
18 the other?

19 THE PROSPECTIVE JUROR: No.

20 THE COURT: When he gets out of boot
21 camp and is on probation, is he going to be
22 living with you?

23 THE PROSPECTIVE JUROR: Yes.

24 THE COURT: Has he been in contact
25 with you?

1 THE PROSPECTIVE JUROR: Yes, sir.

2 THE COURT: Are you making
3 visitations?

4 THE PROSPECTIVE JUROR: Yes.

5 THE COURT: He is not legally formally
6 adopted?

7 THE PROSPECTIVE JUROR: No. He is a
8 kid that needed help that I took in.

9 THE COURT: Do you have a child about
10 his own age?

11 THE PROSPECTIVE JUROR: Yes.

12 THE COURT: From high school?

13 THE PROSPECTIVE JUROR: Yes.

14 THE COURT: Which high school?

15 THE PROSPECTIVE JUROR: Clear Lake.

16 THE COURT: Do you have any questions
17 of her at this time?

18 MS. DAVIES: Did you and I ever talk
19 about the case directly?

20 THE PROSPECTIVE JUROR: No.

21 THE COURT: And I have not talked
22 directly?

23 THE PROSPECTIVE JUROR: No. I always
24 just sat in the back and watched.

25 THE COURT: Just have a seat.

1 (Before the panel)

2 THE COURT: Was there anybody else who
3 recognized any of the participants?

4 An indictment, of course, was returned
5 in this case, it being a felony case. How many
6 people have ever sat on criminal juries in the
7 past? Four or five. Is there anybody here who
8 has ever served on a Grand Jury? No hands. A
9 Grand Jury has a very different function than
10 that of a jury which will be sitting in this
11 case. The Grand Jury is not deciding issues of
12 guilt. A Grand Jury is determining whether or
13 not some reason exists that a finder of fact,
14 either a jury or a judge, should determine a
15 defendant's guilt. They are only saying there
16 is some reason here that we think somebody else
17 should make the determination. Guilt doesn't
18 enter into it when they are voting to true bill
19 or no bill a case. Takes at least nine jurors
20 in a Grand Jury to true bill a case. Generally
21 what happens is a representative of the district
22 attorney's office goes in for a few minutes and
23 gives a Grand Jury a shorthand rendition of how
24 that person viewed the case or what that person
25 determined from certain reports, that kind of

1 thing, and the Grand Jury makes a decision.
2 There are dozen and dozens of cases which are
3 true billed everyday in front of grand juries.
4 In fact, here in Harris County we keep five
5 sitting in the state courts at all times meeting
6 twice a week, each one of those five grand juries.

7 The Grand Jury indictment is no
8 evidence of guilt whatsoever. The indictment is
9 merely a legal pleading. We have to have an
10 indictment before we can proceed to trial. We
11 either have to have an indictment or a waiver of
12 indictment. So it's the means whereby we are
13 here today. It lets the defense know exactly
14 what the defendant is charged with; it sets out
15 for the State exactly what they have to prove,
16 what we refer to as the material elements of the
17 offense. I will give you an instruction in
18 this, as in every criminal case, later on when a
19 jury is charged that the Grand Jury indictment
20 is no evidence of guilt whatsoever and is not to
21 be considered by you as any evidence.

22 The Grand Jury indictment alleges that
23 in Harris County, Texas, on or about September
24 thirteen, 1991, the defendant, Rick Allan
25 Rhoades, did unlawfully intentionally and

1 knowingly cause the death of Bradley Dean Allen
2 by stabbing Bradley Dean Allen with a deadly
3 weapon, namely, a knife, and during the same
4 criminal transaction the defendant did then and
5 there unlawfully intentionally and knowingly
6 cause the death of Charles Allen by stabbing
7 Charles Allen with a deadly weapon, namely, a
8 knife, and by striking Charles Allen with a
9 deadly weapon, namely, a bar.

10 So I have read to you information from
11 the indictment giving you some other
12 information, which is basically the nature in
13 which the offense is alleged to have occurred,
14 the date, September 13, 1991, the names of the
15 two complainants, Charles Allen and Bradley Dean
16 Allen, and a general location, Keith Street in
17 Pasadena, Texas.

18 Now, having heard all of that, is
19 there anyone other than the lady on the first
20 row who thinks you might have heard about this
21 case? Okay.

22 Ma'am, could you come up, please.

23 (Prospective juror Regina Polk
24 approached the bench, and the following
25 proceedings were had:

1 THE COURT: This is number 2 on panel
2 5, Ms. Regina Polk.

3 What do you think you heard?

4 THE PROSPECTIVE JUROR: I had saw the
5 original report of it on Channel 13 when it
6 happened.

7 THE COURT: Can you give me more
8 information?

9 THE PROSPECTIVE JUROR: They were
10 musicians of some sort, I think, if it's the one
11 I am thinking about. That's about it. But I
12 just remember hearing about them.

13 THE COURT: It was about a year or so
14 ago, so you think that is about the same time
15 frame?

16 THE PROSPECTIVE JUROR: Yes.

17 THE COURT: Does anybody happen to
18 have the Code handy?

19 Whatever it was you heard, by the way,
20 you think it was only on TV, not on the radio or
21 in the newspaper?

22 THE PROPECTIVE JUROR: I usually do
23 read the newspaper, but I don't remember
24 anything.

25 THE COURT: You think it was Channel

1 13 because that is what you usually watch?

2 THE PROSPECTIVE JUROR: Yeah.

3 THE COURT: In your mind, do you have
4 any conclusion as to the guilt of the defendant
5 in this case?

6 THE PROSPECTIVE JUROR: No.

7 THE COURT: I am not suggesting that
8 you should have, but I have to ask the question.

9 Is there anything about what you heard
10 that would influence you in this action in any
11 way?

12 THE JUROR: I don't think so.

13 THE COURT: I am just going to
14 reiterate that you are suppose to hear the
15 evidence and make a determination as to guilt
16 based on what you heard in the courtroom.

17 THE PROSPECTIVE JUROR: Yes.

18 THE COURT: So you don't think that
19 whatever it was that you heard would affect your
20 actions in any way?

21 THE PROSPECTIVE JUROR: No, sir.

22 THE COURT: Whatever it was that you
23 heard, do you think you would still be able to
24 render an impartial verdict based on the law and
25 evidence?

1 THE PROSPECTIVE JUROR: Yes, sir.

2 THE COURT: Do you have any questions?

3 MS. KAISER: Do you remember any
4 story on TV regarding an arrest or anything like
5 that?

6 THE PROSPECTIVE JUROR: It was just
7 the original.

8 MS. KAISER: Nothing further.

9 THE COURT: Just have a seat.

10 (Prospective juror Forrest Lynn Luce
11 approached the bench, and the following
12 proceedings were had:)

13 THE COURT: What was it that you
14 heard?

15 THE PROSPECTIVE JUROR: Sounds like
16 the one where the two guys had just built a new
17 home and a recording studio and they were
18 murdered. Just spent the first night there.

19 THE COURT: Where did you hear your
20 information?

21 THE PROSPECTIVE JUROR: Newspaper and
22 on the news, TV news.

23 THE COURT: What do you normally watch?

24 THE PROSPECTIVE JUROR: Usually
25 Channel 2.

1 THE COURT: So, probably whatever you
2 heard, if this is the same case, was on Channel
3 2 television and from the daily newspaper?

4 THE PROSPECTIVE JUROR: Houston
5 Chronicle.

6 THE COURT: Is that the paper you
7 subscribe to?

8 THE PROSPECTIVE JUROR: Yes, sir.

9 THE COURT: Do you remember if you
10 read about this on more than one occasion or saw
11 it on TV on more than one occasion?

12 THE PROSPECTIVE JUROR: I don't
13 remember. I know I saw it on TV and read about
14 it in the paper.

15 THE COURT: Do you recall whether or
16 not you heard about it at the time of the
17 alleged offense?

18 THE PROSPECTIVE JUROR: Yes, sir, soon
19 after that, yes, sir.

20 THE COURT: Do you recall whether you
21 heard or read anything about any kind of arrest
22 in the case?

23 THE PROSPECTIVE JUROR: No, I didn't
24 hear about that.

25 THE COURT: Just the initial

1 discovery?

2 THE PROSPECTIVE JUROR: Yes.

3 THE COURT: If we are talking about
4 the same case?

5 THE PROSPECTIVE JUROR: Yes.

6 THE COURT: Whatever it was that you
7 heard or saw about this case, is there
8 established in your mind any conclusion as to
9 the guilt or innocence of the defendant that
10 would influence you in any action of finding a
11 verdict?

12 THE PROSPECTIVE JUROR: No.

13 THE COURT: Do you feel that you would
14 be able to render an impartial verdict on the
15 law and the evidence?

16 THE PROSPECTIVE JUROR: Yes.

17 THE COURT: Any questions?

18 MS. KAISER: No.

19 MS. DAVIES: No.

20 THE COURT: Just have a seat.

21 (Before the panel)

22 THE COURT: You are beginning to see
23 why it takes so long in a case like this. If at
24 any time there is somebody who thinks you know
25 something about this case, do bring it to our

1 attention. None of these are
2 disqualifications. The other side is simply
3 entitled to know -- well, each side is entitled
4 to know this kind of information, but there may
5 be information that would be helpful to one side
6 or the other in making a determination of how
7 they use their strikes in this case. While I am
8 asking you questions and the counsel are asking
9 you questions, we are going to encourage you to
10 answer just as honestly as you possibly can.
11 There are no right or wrong answers to any of
12 the questions we put to you. The correct
13 response is an honest response. We don't want
14 you loading up on us. We don't want you
15 answering in such a way that you think will get
16 you struck from this jury or answering in such a
17 way that you think will make sure that you get
18 to serve on this jury. We do get upset when we
19 think people are handling themselves in that
20 fashion, also. So just answer as honestly as
21 you possibly can.

22 When they are asking you questions,
23 sometimes they ask you something that the answer
24 to which is embarrassing perhaps or simply is
25 information that you don't want to share with

1 twenty-one other strangers out there. If that
2 this is the case, do raise your hand, ask to
3 approach the bench, and we will try to talk
4 about it outside the presence of everyone else.

5 Witnesses. You should anticipate you
6 are going to hear witnesses in this case. As
7 jurors, you get to determine the credibility of
8 every witness who testifies. You may decide to
9 believe everything one citizen says and
10 disregard everything another witness says. That
11 is up to you. You may choose to believe part of
12 what a witness says and disregard the rest of
13 it. That is up to you. What is important is
14 that you don't make a determination prior to the
15 time of hearing the testimony of a witness that
16 you are either going to believe or disbelieve
17 everything a witness says simply because he is a
18 member of a particular class or has a particular
19 position or holds a certain kind of job. You
20 don't, for example, say I am going to believe
21 everything a priest might tell me and I am going
22 to disregard everything a used car salesman
23 might tell me. You wait and you listen to the
24 testimony. A frequently asked question in
25 criminal cases is would you believe the

1 testimony of a police officer simply because he
2 is a police officer and for no other reason.
3 You should anticipate, in murder cases
4 particularly, that you will hear from police
5 officers at some point. Perhaps after that
6 witness or any other witness has testified, you
7 may say to yourself: Well, based on this
8 witness' background, his training, his
9 expertise, what this witness was able to observe
10 in the case on trial, I am going to believe him
11 more in this case. Maybe not. That is up to
12 you. But before you have ever heard a word of
13 testimony, you don't say you are automatically
14 going to believe a police officer because he
15 wears a blue uniform or disregard someone else
16 because he is a wrecker driver. Any questions?
17 Anybody have any conflict with that?

18 I told you a little while ago about
19 the indictment in a criminal case being no
20 evidence of guilt whatsoever. I want to go over
21 several general principles of law. Many of
22 those you are familiar with, particularly those
23 who have served on criminal juries in the past,
24 and most of you, because you have seen far too
25 much television in your lifetimes, and we have

1 to re-educate you, since you have seen too much
2 L A Law and Petrochelli and Perry Mason and all
3 the rest of them. But a defendant does have the
4 presumption of innocence. As this defendant or
5 any defendant in a criminal case sits in a
6 courtroom, he is not a little bit guilty. He is
7 presumed innocent. That is a legal
8 presumption. It may be overcome by legally
9 competent evidence. That is what the State
10 attempts to do when they call witnesses to the
11 stand. They are attempting to chip away at his
12 presumption of innocence so that, in their
13 opinion, at the time they rest, they are, in
14 effect, saying: We, the State, think we have
15 now proved this defendant's guilt beyond a
16 reasonable doubt. We have met our burden of
17 proof. And they rest. He is presumed
18 innocent. It's a legal presumption. It can be
19 overcome with legally competent evidence. The
20 burden of proof in a criminal case is for the
21 State to prove a defendant's guilt beyond a
22 reasonable doubt. Not beyond all doubt,
23 contrary to television, not beyond a shadow of a
24 doubt but beyond a reasonable doubt. For most
25 prospective jurors to have a case proven to

1 their satisfaction beyond all doubt, that juror
2 would have had to have been present and observe
3 the offense occur. If that were the case, you
4 would be a witness and you could not sit as a
5 juror in a case. We have those rare
6 circumstances where video cameras are filming
7 everything that occurs in a criminal offense.
8 Bank robbery, the occasional convenient store
9 robbery, that kind of thing. Those cases
10 usually have evidence that is so overwhelming,
11 with the tapes rolling, that they never get to
12 trial. For some jurors, that is what they would
13 need to find a defendant guilty beyond all doubt
14 or beyond a shadow of a doubt. What we are left
15 with are all those other cases where you have to
16 hear witnesses come to court, take the witness
17 stand under oath and tell you what they saw
18 occur or what their investigation resulted in.
19 You are getting information second and third
20 hand. For that reason, the burden is to prove a
21 defendant's guilt beyond a reasonable doubt.
22 Reasonable doubt means different things to
23 different people. There is not going to be a
24 definition that I am going to tell you right
25 now. Each side may get up and tell you a

1 definition of reasonable doubt because, after
2 well over a hundred years, our Court of Criminal
3 Appeals in the last few months has finally given
4 us a definition of what beyond a reasonable
5 doubt means. And if they want to read it to
6 you, they certainly may; but it's a very
7 individual kind of concept. What is reasonable
8 doubt for juror number one would not be
9 reasonable doubt for juror number five even
10 though they both sat here and listened to the
11 very same testimony. It's not a matter of
12 numbers; it's not a matter of percentages; it's
13 not a matter of who calls the most witnesses.
14 It's up to you to make that determination.

15 As I said earlier, at some point the
16 State will rest, and the defense has the burden
17 or has the -- I slipped up there -- does not
18 have any burden. The defense has the
19 opportunity to go forward. The defense doesn't
20 have to call witnesses. They do have to call
21 the defendant, they do not have to call any
22 witnesses at all, and the State can not call the
23 defendant to the stand. Oftentimes in criminal
24 cases you will see the defense rest right behind
25 the State without ever having called any

1 witnesses at all. Keeping in mind, the State at
2 the point where they are resting are, in effect,
3 saying we think we have met our burden of proof,
4 we have proven the defendant's guilt beyond a
5 reasonable doubt, we rest, it's passed to the
6 defense to go forward if they choose to do so.
7 Oftentimes the defense rests, in effect, saying
8 we don't believe the State has met their burden
9 of proof. We don't believe they have proven his
10 guilt beyond a reasonable doubt. And if you had
11 to go back right now and decide this case, you
12 would have to note not guilty. They might do
13 that. They might call witnesses. I don't know
14 in advance what is going to happen. There are
15 subpoena lists on file, but they don't have to
16 call everyone on the subpoena lists. Frequently
17 in criminal cases the subpoena lists of the
18 State and defense are identical. And the State
19 gets first crack at the witnesses. They get to
20 go first. So, if the defense were going to call
21 someone for some particular object, I don't know
22 why, but if they were going to call somebody to
23 get some kind of fact before the jury, it may
24 well be they can get that out in cross examining
25 the witnesses called by the State and

1 effectively present whatever case they wanted to
2 present and rest without ever having called
3 anyone. The defense does not have to call that
4 defendant to the stand. A defendant in a
5 criminal case has the fifth amendment
6 privilege. He does not have to take the stand
7 and testify in his own behalf. Each of you as
8 potential criminal defendants has that right. I
9 know full well that many of you would say
10 individually that if you were ever charged with
11 a criminal offense you would want to get up
12 there and tell everything you knew. Maybe you
13 would and maybe you wouldn't. There are many
14 legitimate reasons why people don't take the
15 stand in their own behalf. Usually that
16 decision is made in conference between the
17 defendant and his counsel after the State has
18 rested. Your counsel may well be telling you,
19 properly, not to get on the stand and testify.
20 You can't help yourself at this point, the State
21 hasn't proven their case, we shouldn't do
22 anything. Many people, prospective defendants
23 in criminal cases in this courthouse have severe
24 accents and don't want to take the stand. Many
25 defendants appear for all the world like they

1 are telling a lie when in fact they are telling
2 the truth simply because of the stress they are
3 under when they are on the witness stand. So,
4 there are many legitimate reasons why people
5 don't take the stand in their own behalf, and
6 you can't speculate on those reasons. I know
7 it's natural curiosity to try to figure out why
8 didn't so and so take the stand. You can't
9 think like that; you can't speculate on things
10 you haven't heard. You have to be able to base
11 a verdict on what you have heard, on the
12 evidence that is presented in the courtroom. If
13 there is not enough evidence to establish a
14 defendant's guilt beyond a reasonable doubt, you
15 vote not guilty. If you do believe the
16 defendant had been proven guilty beyond a
17 reasonable doubt, you vote guilty. If a
18 defendant does not take the stand and testify in
19 his own behalf, I will give you an instruction
20 in the Court's Charge to the effect that his
21 failure to testify is not to be considered as
22 any evidence of guilt whatsoever. Anybody have
23 any problem with that? Any conflicts so far?

24 Let's take a couple of hypotheticals
25 and make sure you understand. Indictment is no

1 evidence. A defendant is presumed innocent.
2 The State has the burden of proof. And failure
3 to testify is no evidence of guilt whatsoever.
4 Let's say we suddenly selected twelve members of
5 the jury, the defendant was arraigned, entered a
6 plea of not guilty after the indictment was
7 read, and I immediately charged the jury and
8 sent you to the back to deliberate the case.
9 You would have to vote not guilty in that
10 situation because he is presumed innocent, the
11 indictment isn't any evidence, failure to
12 testify isn't any evidence at all, and the State
13 had the burden of proof and didn't go forward.
14 You would have to be able to vote not guilty in
15 that situation. You would be obligated to vote
16 not guilty.

17 Anybody have any problem with that?

18 Let's take another hypothetical. The
19 defendant is arraigned, a plea is entered, State
20 goes forward by calling witnesses to the stand.
21 At some point, the State rests. Defense rests
22 right behind the State without ever having
23 called any witnesses, including the defendant.
24 Charge is read to you. You go back to
25 deliberate. This case, you as an individual

1 juror believe that the defendant's guilt had
2 been proven beyond a reasonable doubt. Whatever
3 it took for you, the State had met their
4 burden. In your mind, the State had proven his
5 guilt beyond a reasonable doubt, but he didn't
6 testify. You would have to vote guilty in that
7 situation. Is there anybody who could not vote
8 guilty even if you believed the State had proven
9 a defendant's guilt beyond a reasonable doubt?
10 Seems like a silly question, but occasionally we
11 have members of a prospective jury panel who
12 believe, for whatever reason, be it personal or
13 philosophical or religious reasons, they simply
14 could never participate in a verdict of guilty
15 even if they believed the defendant guilty
16 beyond a reasonable doubt. Is there anybody of
17 that mind on this panel? I assume by your
18 silence there is none.

19 Third and last hypothetical. State
20 goes forward, calls witnesses, State rests.
21 Defense rests right behind the State. You go
22 back to deliberate. In this scenario you as an
23 individual juror believe the State had not
24 proved the defendant's guilt beyond a reasonable
25 doubt. Whatever it took for you individually,

1 the State hadn't done it. After deliberating
2 with those other jurors, talking about the case,
3 you believe the State had proven his guilt
4 beyond a reasonable doubt, but he didn't
5 testify. You would be obligated to vote not
6 guilty. You cannot use failure to testify for
7 any purpose. You can't give it any weight to
8 get you over the hump, so to speak, from not
9 guilty to guilty. Anybody have any problem or
10 any conflict with that? All right. No
11 questions at all so far? You're hardly even
12 nodding. They are going to make you speak up
13 when they start talking to you.

14 Lesser included offenses. There are
15 certain other offenses than the primary charge
16 which you may see when you go back to deliberate
17 a case. That is to say you may hear evidence
18 regarding another offense or be given an option
19 to find a defendant guilty of a lesser offense
20 than the primary charge.

21 Murder. If somebody knowingly or
22 intentionally causes the death of another
23 person, that is murder. That is a first degree
24 felony offense of what we refer to as simple
25 murder or straight murder. A lesser included

1 offense of that may be such things as voluntary
2 manslaughter, a second degree felony,
3 involuntary manslaughter, a third degree felony,
4 a class A misdemeanor offense of negligent
5 homicide perhaps. It just depends on the case
6 and what the testimony shows and what kind of
7 evidence has been admitted. I don't know in
8 advance, like I said before, what I am going to
9 hear in this case. If there is anything in the
10 record about a possible lesser offense, I am
11 obligated to put that in the Court's Charge.
12 That is to give the jury an option of finding a
13 defendant guilty of a lesser offense, if
14 anything. A capital murder case is the ultimate
15 offense in Texas. We have misdemeanor offenses,
16 we have felony offenses, we have capital murder
17 offenses. When I am saying a capital murder
18 offense, I am talking about an offense for which
19 on conviction there are only two possible
20 punishments, either a life sentence or the death
21 penalty. That is what a capital offense is, one
22 which can only result in a life sentence or the
23 death penalty, not a term of years. We know
24 that lesser included offenses of capital murder
25 can be murder, voluntary manslaughter,

1 involuntary manslaughter, on down the line like
2 that. Those first, second, third degree
3 felonies. They just stair step down from
4 capital murder at the top down through murder,
5 a first degree felony, which is punishable by
6 confinement for not less than five years nor
7 more than 99 years or life, down to voluntary
8 manslaughter, two to twenty years, involuntary
9 manslaughter, two to ten years, misdemeanor
10 offenses up to a year in county jail. They
11 just stair step down and are lesser included
12 offenses. If I give you a charge that has a
13 lesser included offense in it, I am not making a
14 determination that is what you should find a
15 defendant guilty of, if anything. I am merely
16 obligated to put it in the charge. So, you
17 might see a charge which asks you whether or not
18 you believe that the State has proven the
19 defendant's guilt beyond a reasonable doubt and
20 vote guilty or not guilty. You may see a
21 charge that has in it something to the effect
22 that if you do not believe beyond a reasonable
23 doubt that a defendant is guilty of capital
24 murder, you are next to consider a lesser
25 charge, such as murder or voluntary manslaughter

1 or involuntary manslaughter. Those are options
2 you may see later. I just don't want you to
3 get hit blindsided by that for the first time
4 when you hear about it later on in individual
5 questioning.

6 Any questions so far?

7 All those other offenses have ranges
8 of punishment, as I said, that include a term of
9 years as a possibility. Capital murder does
10 not. It's either life or death. We have very,
11 very wide ranges of punishment for those other
12 offense because there are so many different ways
13 in which certain kinds of offenses can be
14 committed. All first degree felony offenses
15 have the same range or punishment, five to 99
16 years or life. In addition, a fine not to
17 exceed ten thousand dollars may be assessed.
18 First degree felony offenses include everything
19 from delivery of cocaine to burglary of a
20 habitation, aggravated robbery. Straight or
21 simple murder, is a first degree murder. The
22 ranges are so wide because there are so many
23 different ways that each one of those different
24 kinds of offenses can be committed. When I say
25 murder, most of you think of some kind of

1 preconceived type murder type situation. It
2 may be a husband killing a wife, somebody who
3 has had a quarrel with somebody and lies in wait
4 and assassinates them. You usually think of
5 the kinds of offenses which are, for want of a
6 better term, more aggravated. It's usually more
7 difficult for jurors to consider those
8 hypothetical situations in which the lesser
9 range of punishment might be appropriate in a
10 proper case. We disagree over our
11 hypotheticals. And if there is disagreement in
12 hypotheticals, each side has the opportunity to
13 present their own. But a possible murder
14 hypothetical, one that you may have never
15 considered before is one involving a euthanasia
16 type case where someone--

17 MR. STAFFORD: May I have the record
18 reflect my objection?

19 THE COURT: The record so reflects
20 your objection.

21 Where, for example, we extend
22 hypotheticals because we are trying to make a
23 point. Let's say husband and wife have been
24 married for sixty years. They love each other
25 dearly. Wife is dying of some incurable

1 disease, some painful disease. She's on
2 life-support equipment. The doctors have been
3 in and said she only has twelve to twenty-four
4 hours to live. She's in extreme pain; but
5 because of the nature of her life-support
6 equipment, she can't receive any medication to
7 relieve her pain. Doctors leave the room, she
8 pleads with the husband to, in effect, pull the
9 plug. He does so. He has committed an act
10 clearly dangerous to human life, some would
11 argue, resulting in her death. Even though she
12 would have been dead hours later perhaps, he has
13 caused her death. That could be charged as a
14 murder case, a person could be indicted for,
15 could be tried for that offense, could perhaps
16 be convicted of the offense of murder, and if
17 convicted, a jury would determine the
18 appropriate punishment, that perhaps, remember I
19 am extending this hypothetical, is the kind of
20 case where a jury might be able to consider the
21 lesser range of punishment. It's usually easy
22 for jurors to think of a situation which is more
23 aggravating. I am just saying that to
24 illustrate to you that we have to have these
25 very, very wide ranges of punishment. We can't

1 commit you to what you would do in a certain
2 fact situation. We want you to be able to keep
3 open minds when you come in here and be able to
4 consider the entire range of punishment after
5 you have heard what the circumstances were.
6 Anybody who thinks you could not do that?

7 Let's go back to the offense of
8 capital murder. When a jury finds a defendant
9 guilty of the offense of capital murder, we
10 don't ask the jury to go back and vote either
11 life or death; instead, we ask them to answer
12 certain questions. Now, while I said earlier
13 that a capital murder offense is a murder plus
14 some other aggravating factor, I think we
15 probably need to go through under the Texas
16 statutes what those all include because some of
17 you are very confused about those and don't
18 consider that certain offense are capital murder
19 offenses. Our statutes set out six different
20 ways in which the offense of capital murder can
21 be committed. One is where a fireman or a
22 police officer is murdered in the lawful
23 discharge of an official duty. You probably
24 have seen those on television, read them in the
25 newspaper. That is a capital murder offense.

1 Murder plus the aggravating factor of the victim
2 being a fireman or police officer in the lawful
3 discharge of an official duty. One is the case
4 where somebody commits a murder for remuneration
5 or the promise of remuneration. Murder for hire
6 schemes. You probably read about those. There
7 was a famous one in the courts recently in this
8 county. One is the situation where someone is
9 incarcerated in a penitentiary and murders an
10 employee of that penal institution. That is
11 capital murder. One is where someone is
12 escaping or attempting to escape from a penal
13 institution and commits a murder. That is
14 capital murder. The category that most of you
15 are familiar with, the ones that you see on
16 television and read about in the papers
17 sometimes on a daily basis is where someone is
18 in the course of committing another felony or
19 attempting to commit another felony and commits
20 a murder. The other felony being robbery,
21 burglary, kidnapping, aggravated sexual assault
22 or arson. If somebody is in the course of
23 committing one of those offenses or attempting
24 to commit one of those offenses and murders
25 someone, that is a capital murder offense,

1 punishable on conviction only by life or
2 death. Such as the example where a woman is
3 kidnapped from a parking lot, taken somewhere,
4 raped and murdered. That is a capital murder
5 situation. A convenient store clerk in the
6 course of committing a robbery, he is murdered,
7 that is the robbery plus the murder, that is a
8 capital murder situation. The sixth and final
9 category we have of capital murder is where
10 someone murders more than one person in the same
11 criminal transaction. It can be a number of
12 people. It can be as few as two people. The
13 Jeffrey Dahmer situation in Wisconsin could be a
14 capital murder situation. We know from my
15 having read this indictment to you that the
16 allegation in this case is that two people were
17 murdered in the same criminal transaction. That
18 is what gets it to capital murder status. You
19 have those six different ways, everything from
20 murder of a police officer in the course of the
21 lawful discharge of an official duty to murder
22 in the commission of another felony to murder of
23 two or more people in the same criminal
24 transaction and all those other things.

25 Many of you did not know that all of

1 those cases were capital murder offenses. I
2 know you have to answer certain questions in
3 this long form questionnaire before we tell you
4 about that kind of thing.

5 Now, what happens if a jury returns a
6 verdict of guilty of capital murder. There is
7 a second stage of trial, just as there would be
8 a second stage of trial if you found the
9 defendant guilty of any other offense. Again,
10 that is where you might hear evidence of
11 background, reputation, prior bad acts, previous
12 criminal convictions, if any, that kind of
13 thing. The information you think would be
14 helpful in deciding in another case what the
15 range of punishment should be but in a capital
16 murder case how you answer certain special
17 issues. Both the jury and I are insulated a bit
18 in a capital murder case because you do not go
19 back and vote for life or death on conviction of
20 capital murder; instead, you answer certain
21 special issues. And I will tell you in advance
22 exactly what I am going to do, whether I assess
23 life imprisonment or the death penalty as
24 required by law, depending on how you answer
25 those questions.

1 The first question I would give you is
2 over here on this board, and we will let you see
3 it at a later time. The question is: Do you
4 find from the evidence beyond a reasonable doubt
5 that there is a probability that the defendant
6 would commit criminal acts of violence that
7 would constitute a continuing threat to
8 society. Now, keeping in mind you have already
9 heard the evidence in the case in chief. You
10 have already found somebody guilty of capital
11 murder and you have heard additional evidence
12 perhaps in the second stage of trial, and now
13 you are asked to answer this special issue, this
14 question. This is the question where we are
15 asking the jury to make a determination of a
16 defendant's future dangerousness. I would give
17 the jury an additional instruction that you are
18 to consider all the evidence admitted at the
19 guilt or innocence stage, all the evidence at
20 the punishment stage, including evidence of a
21 defendant's background or character or
22 circumstances of the offense that militate for
23 or mitigate against the imposition of the death
24 penalty. So you have everything, both stages
25 of trial when you go back and decide this issue

1 of future dangerousness.

2 The word probability is in there. In
3 common usage, we would say that probability
4 means more likely to occur than not.

5 The last word in that question is
6 society. Criminal acts of violence that would
7 constitute a continuing threat to society.
8 Society is a term that goes undefined. I don't
9 give a definition in the Court's Charge.
10 Society does include the society within the
11 penal system. The penitentiary system is part
12 of society, what we used to call TDC, what we
13 now call the Institutional Division of the Texas
14 Department of Criminal Justice. So, do you find
15 beyond a reasonable doubt that there is a
16 probability that the defendant would commit
17 criminal acts of violence that would constitute
18 a continuing threat to society. You answer yes
19 or no. It takes all twelve jurors agreeing, a
20 unanimous verdict to answer that question yes.
21 Ten or more have to agree to return a no
22 answer. If you answer no on number one, there
23 is no such probability beyond a reasonable
24 doubt, I take the case back, I assess life
25 imprisonment, your job is ended. If you answer

1 that question unanimously yes, there is such a
2 probability that the defendant would commit
3 criminal acts of violence constituting a
4 continuing threat to society, then you proceed
5 to the second special issue. Sometimes when you
6 are answering number one you do get other
7 evidence of a defendant's background, character,
8 prior bad acts, that kind of thing. Sometimes
9 that information is not made available to you.
10 Sometimes you have to answer that question based
11 solely on what you have heard in the case in
12 chief. We would say that there are those cases,
13 those capital murder offenses where the
14 circumstances surrounding the commission of the
15 offense are so horrendous that based on the
16 commission of that offense alone a juror could
17 in the proper case find that there would be a
18 probability that defendant would commit criminal
19 acts of violence constituting a continuing
20 threat to society. You make up your own kind of
21 hypothetical. This being the fifth week, I
22 won't give you a hypothetical. If these parties
23 want to do so, they may.

24 Is there anybody here who can not see
25 how under some circumstances that question as to

1 probability could be answered yes and sometimes
2 be answered no, depending on the evidence you
3 had before you?

4 Proceeding to number two. And you
5 only get to number two if you have answered
6 number one yes there is such a probability. The
7 number two question is asking whether, taking
8 into consideration all the evidence, including
9 the circumstances of the offense, the
10 defendant's character and background and the
11 personal moral culpability of a defendant, there
12 is a sufficient mitigating circumstance or
13 circumstances that warrant that a sentence of
14 life imprisonment rather than a death penalty be
15 imposed. I would instruct you that mitigating
16 evidence is evidence you might regard as
17 reducing a defendant's moral blameworthiness.
18 Our statutes don't help us out a whole lot
19 here. They don't tell us exactly what is
20 mitigating and what isn't. The statutes don't
21 define or limit the aspects of a defendant's
22 character or background or record or the
23 circumstances of the offense that are
24 mitigating. And the law doesn't impose any kind
25 of formula for determining how much weight to

1 give a mitigating circumstance. This is a
2 rather new wrinkle in our capital murder law.
3 Each side has the opportunity at the punishment
4 stage to call witnesses. Each side has the
5 opportunity to present other kinds of evidence.
6 You cannot require one side or the other to
7 present certain kinds of evidence. You might
8 anticipate that a certain type of mitigating
9 evidence might come from one side as opposed to
10 the other but you can't require it. Sometimes
11 jurors hear what they feel is mitigating from
12 the State's case. They may hear evidence of a
13 defendant's age perhaps, that that particular
14 juror would think would be mitigating in the
15 case on trial. Frequently mitigating evidence
16 comes in the form of witnesses called by the
17 defense. For example, you might hear evidence
18 of a very bad kind of background that a
19 defendant had lived through, and you might think
20 that is mitigating in the case you have before
21 you. I can't tell you exactly what is
22 mitigating and what isn't. I can't tell you if
23 the list of mitigating circumstances is twenty
24 items long or if it's twenty thousand items
25 long. That is up to you to decide. You may

1 hear this evidence and you may say it's
2 mitigating, or you might say to yourself: This
3 could be mitigating in another case but not in
4 this case. Even if you do decide it's
5 mitigating, you decide how much weight to give
6 it. One juror might give it very little
7 weight, another might rely on it a great deal in
8 answering special issue number two. There is no
9 burden of proof in special issue number two.
10 You are simply asked to go back there and look
11 at everything you have before you and decide if
12 there is some kind of mitigation why the death
13 penalty should not be imposed. While I can't
14 tell you exactly what is and is not mitigating,
15 I can tell you that mitigating evidence does
16 include such things as mental retardation and
17 mental illness. In the proper case, it can
18 include such things as a defendant's good
19 behavior in prison or in jail while he is
20 awaiting trial. It can include an exceptionally
21 unhappy or unstable childhood, drug use or
22 economic deprivation, youth, a defendant's age,
23 voluntary intoxication, drug dependency,
24 illiteracy, opinion testimony of lay witnesses
25 or psychiatric opinion testimony that a

1 defendant would not be a danger in the future.
2 All those things in a proper case could be
3 mitigating evidence. But you listen to it and
4 you make a determination as to mitigation and
5 you determine the weight to give it when you're
6 answering this question. Here it takes all
7 twelve people to agree on a no answer. It takes
8 ten or more to agree to a yes answer. If that
9 question is answered yes, again I assess life
10 imprisonment. A death penalty only results if
11 the unanimous answer to number one regarding
12 probability is yes and the unanimous answer on
13 number two is no. A yes, no, I assess the death
14 penalty. We are each insulated a little bit
15 from voting for life or death, but you get to
16 know exactly what I am going to do depending on
17 how you answer those two questions.

18 Any questions so far?

19 We want to make it clear that there
20 are no automatic yes, no answers on these
21 questions. Each one is going to vary, depending
22 on what you have before you, the circumstances
23 of the offense, the kind of evidence that has
24 been admitted and that you have to deliberate on.

25 Any questions at all so far? You are

1 very confused.

2 THE COURT: Ms. Davies.

3 VOIR DIRE EXAMINATION BY THE STATE
4 BY MS. DAVIES:

5 Let me introduce myself again. My
6 name is Carol Davies. This courtroom is really
7 uncomfortable with the post and the setup. We
8 think we all have a hard time getting situated
9 and having a comfortable place to work, so you
10 will have to bear with us a little bit.

11 My name is Carol Davies. I am an
12 assistant district attorney. You probably all
13 know by name your elected district attorney,
14 Johnny Holmes. I am sure you understand there
15 is no way Mr. Holmes can be in all the criminal
16 courts in this county handling the hundreds,
17 thousands of criminal cases that are pending.
18 There are close to two hundred attorneys who are
19 his assistants. I am one of them. And we are
20 each assigned to different courts handling
21 different types of cases, depending on our
22 experience and whatever. That is why I am
23 here. You have heard the judge use the term the
24 State. The State does this, the State has the
25 burden of proof. A lot of references to the

1 State. He is talking about me. I am here
2 representing the State. I am here to see that
3 the laws of the state are enforced, hopefully
4 that justice is done, and that appropriate
5 punishments are given out in the case that is on
6 trial. So, that is who they are talking about.
7 I always like to mention that because I think
8 it's easy to recognize the court reporter, the
9 judge and the bailiff. I mean, their roles are
10 pretty well defined. But a lot of time people
11 scratch their heads over that. So, you know my
12 job. And the twelve of you who are chosen to be
13 on this jury have the job of deciding what is
14 the truth, what really happened. You will
15 decide the facts in the case while the judge
16 decides the law, makes the legal decisions.

17 This is kind of an orientation
18 session. When we are talking about a capital
19 murder case, we have the opportunity to talk to
20 each one of you individually. But, hopefully,
21 we are going to save time over the long run here
22 by having this opportunity to talk to you
23 individually. I am going to use this time to
24 talk about some of the concepts that come up in
25 just about any criminal case, not just capital

1 murder. I am going to wait and talk about those
2 things that are unique to capital murder cases,
3 at least in the most part those things are
4 unique to capital murder cases, for example, the
5 two issues at the punishment stage. I am going
6 to wait and talk to you about those things when
7 we meet and talk individually, but for now we
8 want to just go over some of the standard things
9 that come up. I noticed there are a few of you
10 who have been on juries before but most of you
11 haven't, so for those of you who have had jury
12 service, kind of bear with us because the ones
13 who come in here and have never had that
14 experience I think usually can appreciate this.
15 There are things that they are not familiar with
16 in everyday life. And capital murder is one of
17 them.

18 How many of you came in here today
19 thinking that the death penalty was a
20 possibility in any murder case? Anybody under
21 that impression? No. Usually several people
22 raise their hand.

23 THE PROSPECTIVE JUROR: State the
24 question again.

25 MS. DAVIES: Think that the death

1 penalty was a possibility in any murder case?

2 THE PROSPECTIVE JUROR: Sure.

3 MS. DAVIES: But it is not. That is a
4 very common misconception because people think
5 it's kind of an eye for an eye notion, that the
6 death penalty is a possibility in any murder.
7 It has to be capital murder. That it's a unique
8 kind of murder. And that is why it's important
9 that we explain all these things to you so that
10 everybody understands what we are dealing with
11 as we get into it.

12 There are many varieties of murder or
13 homicide under our state law. The judge has
14 touched on them, and I want to go over them
15 again. We will start at the top of the ladder.
16 The most serious, the top rung of the homicide
17 scheme is capital murder. Capital murder is the
18 only offense where the death penalty is a
19 possibility. There are only two possible
20 punishments, life or death. That capital
21 murder offense is an intentional murder plus
22 something more, the aggravating factor. That
23 aggravating factor that elevates an intentional
24 murder to capital murder can be something like
25 it's the murder during the course of a robbery,

1 murder during the course of a rape, murder of a
2 police officer in the lawful discharge of his
3 duty, the murder of more than one person in the
4 same criminal transaction. So, just -- I may
5 sound like I am minimizing murder, but just
6 plain murder, just intentional murder is not
7 enough. It has to be murder plus the
8 aggravating factor.

9 Below that, if we come on down the
10 ladder, looking at all the different -- we refer
11 to them as lesser included offenses because the
12 lesser offenses are all a part of the greater
13 offense, the greatest one is capital murder.
14 It's kind of like taking off the layers of an
15 onion or, you know, those dolls that kids play
16 with that nest inside, they get bigger and
17 bigger, so the little one, the lesser offense is
18 always a part of the other. You just keep
19 adding other factors to make it more serious to
20 get to the greater offense. So, start at the
21 top and come down. Capital murder is at the
22 very top. Below that is your first degree
23 murder, first degree felony punishable by five
24 to 99 years or life. And by the way, all these
25 lesser ones also have a possible optional fine

1 attached. I am going to mention that once and
2 leave it off because I think it's the number of
3 years that is the more significant part of the
4 punishment. First degree murder, five to 99
5 years or life. That is the intentional or
6 knowing taking of someone's life. No
7 aggravating factor; otherwise, it would be
8 capital murder. And, I mean, it could be as
9 brutal as you want it to be, but it still is
10 just the intentional or knowing taking of
11 somebody's life. That could be anything. Most
12 people come in with the idea, I mean, you have
13 some notion of what is murder. That intentional
14 murder could be a sniper who sits up on the roof
15 of a building and picks off, just shoots a
16 stranger on the street. It could be a domestic
17 quarrel, something that has been festering and
18 growing for years where somebody just finally
19 loses it and shoots a spouse. It could be a
20 barroom fight. It could be the mercy killing or
21 euthanasia example that the judge has given
22 you. And I give all those examples to point out
23 it could be anything from a somewhat sympathetic
24 sad situation to a brutal killing of a
25 stranger. All intentional or knowing murder.

1 All first degree felonies. If you come on down
2 the hierarchy down to the next lower rung on the
3 ladder, that is voluntary manslaughter, second
4 degree felony. Second degree felony is
5 punishable by two to twenty years. Voluntary
6 manslaughter is, again, an intentional or
7 knowing killing, intentionally taking someone's
8 life; however, it is done under certain unique
9 circumstances. The legislature has seen fit to
10 downgrade an intentional or knowing killing when
11 it is committed under the influence of sudden
12 passion from an adequate cause. And then it
13 gives -- the legislature has given us a
14 definition which would explain that when one is
15 acting under the influence of the kind of
16 emotion, rage or passion they don't have time to
17 reflect. In other words, they act very quickly
18 and under the influence of this rage, and the
19 rage was induced by the deceased under
20 circumstances that a reasonable person would
21 accept as reasonable. That is to paraphrase in
22 laymen's terms. Let me give you an example to
23 try to illustrate that. This would be an
24 example of why an intentional or knowing murder,
25 first degree murder would be downgraded in this

1 kind of situation. You come home from work.
2 Your twelve-year-old daughter was home alone.
3 You get home from work. There she is. She's
4 beaten, she's cut up, she is bleeding, she's
5 sobbing, she has been raped. Mr. Jones, who
6 lives down on the corner, forced his way into
7 the house and, you know, raped her, slashed her
8 up. You as a parent are enraged. Instead of
9 reaching for the phone to call the police, grab
10 a gun, go down to the corner, blow him away.
11 You kill him. Intentional murder. The law
12 says, yes, it's intentional murder, but if a
13 jury believes that a reasonable person may very
14 well be so enraged they would act this way they
15 can say this is voluntary manslaughter, and it
16 would not be one punished as seriously. So that
17 is an extreme example. With all of these
18 examples, you are going to find out we use
19 extreme examples because it kind of helps to
20 illustrate the point a little bit.

21 The next lower or lesser homicide
22 offense would be involuntary manslaughter.
23 That is a third degree felony, punishable by two
24 to ten years. That is the reckless taking of
25 someone's life. Reckless means you should have

1 known that your conduct was going to present a
2 serious threat to someone's life -- pardon me --
3 you did know. You did know that your conduct
4 was a serious threat, but you disregarded that
5 and acted anyway, and the result was that
6 somebody died. Common example of involuntary
7 manslaughter, your third degree homicide, would
8 be the situation that you read about in the
9 newspaper every day where someone is driving
10 while intoxicated, they hit a car, somebody is
11 killed. They knew there was a risk, get behind
12 the wheel drunk, disregarded the risk, result of
13 their conduct is somebody's death. Involuntary
14 manslaughter. And then at the very bottom rung
15 of the homicide ladder, the last lesser, is
16 negligent homicide. That isn't even a felony
17 offense. Misdemeanor offense punishable,
18 maximum, a year in the county jail. That is
19 where one negligently causes death where they
20 should have known that their conduct was going
21 to endanger someone but didn't know. Still
22 resulted in somebody's death.

23 Now, the reason we want to be sure
24 that you understand all of those -- and for now
25 let's just disregard capital murder. Let's just

1 talk about all of those lessers. Ranging all
2 the way at the top, the intentional, five to
3 life range, down to involuntary, two to ten.
4 All the felonies.

5 In any instance where we are in trial
6 on a greater offense, there is the possibility
7 that a jury would get an instruction from the
8 judge that permits them to consider finding one
9 guilty of the lesser offense. And in an
10 instance like that, if you were on the jury, we
11 would need to know whether you could consider
12 the entire range of punishment. Remember now
13 we are not talking about death penalty. We are
14 not talking about a capital murder. We are just
15 talking about the term of years that would be
16 included in any of those lesser offenses, two to
17 ten, two to twenty, five to life, depending on
18 which category of homicide we would be talking
19 about.

20 Is there anyone here who could never
21 consider sentencing someone to life in the
22 penitentiary? No matter what the crime is, they
23 just felt like, no, I couldn't do that, no
24 matter what the facts. Anyone feel that way?
25 Are you awake out there? Usually there is

1 somebody who does feel that way. By the way,
2 you know, nod your head, raise your hand, stomp
3 your feet, whatever it takes to let me know how
4 you feel about some of these things. I just
5 need to know if you could if you thought it was
6 a proper case sentence someone to life in the
7 penitentiary for homicide, first degree
8 homicide. Okay.

9 The other end of the range, the judge
10 focused on this more, is the minimum, as little
11 as -- let's talk about intentional -- as little
12 as five years or, if you were talking about the
13 second or third degree, as little as two
14 years. There is a very wide range of fact
15 situations, which I think you all realize now.
16 And that is why there is such a wide range of
17 punishment. So our concern is to know and be
18 sure that each of you is the kind of person who
19 would keep an open mind, wait, hear the facts of
20 the case and then be able to decide what was
21 appropriate, given the facts that you heard in
22 evidence. Can each of you do that? In other
23 words, consider the minimum as well as the
24 maximum and anything in between if you sat on a
25 jury for either a first, second or third degree

1 homicide. You can do that? Okay.

2 You know that this is the intentional
3 taking -- this particular case, the indictment
4 is for the intentional taking of two lives, both
5 Brad and Charles Allen. That is what makes it
6 capital murder is two people. When we are
7 talking about capital murder, I have to prove
8 that it was an intentional killing. Doesn't say
9 anything about premeditated.

10 Anybody feel like it would have to be
11 a premeditated crime for it to be an offense
12 that should be a capital murder? I know you
13 have all heard that term. It's mainly on TV.

14 What does it take to act
15 intentionally? I am going to suggest to you
16 that a person can form the intent to kill just
17 as quickly as they can form the intent to do
18 anything else. And I guess the other thing I
19 want us to think about is how one proves the
20 intent. You know, the judge has already
21 reminded each of you that this defendant, every
22 defendant has the right to remain silent. He
23 doesn't have to testify. I can't make him
24 testify. If he did testify, he may or may not
25 tell the truth. He has a lot at stake. Under

1 those circumstances, I have got to come into
2 court in this case, like I do in every case, and
3 prove intent based on the circumstances. You
4 look at his conduct. You look at what he did to
5 determine what he intended to do. Do you feel
6 like you can do that? Is there anybody who
7 thinks they couldn't, that they couldn't decide
8 what somebody intended to do by looking at their
9 conduct in the circumstances? Anybody
10 troubled? For example, I think sometimes that
11 is kind of a vague notion. If I am standing
12 here with my cup and it falls to the ground as
13 I'm standing here now, you might not be entirely
14 sure whether I intended to drop the cup or it
15 just slipped out of my hand. On the other hand,
16 if I brought my hand back and slammed it
17 against, hurled it across the room and hit the
18 wall with it, based on my conduct, you might be
19 able to conclude she intended to drop the cup.
20 Or say it slipped out of my hand, hit the floor,
21 you are not too sure. I picked it up and
22 slammed it down again. Do you think you can
23 look at the circumstances and decide what the
24 intent was? Anybody who thinks that is not
25 possible or that you could not do it?

1 As far as being able to decide how
2 long it takes, because when we are talking about
3 murder, as I say, it doesn't have to be
4 premeditated. It could be a barroom fight could
5 erupt suddenly. Two people didn't plan ahead.
6 Or any of us who drive the freeways these days
7 and you read the newspapers, there could be a
8 situation where you cut somebody off, cut in
9 front of them on the freeway, makes them mad,
10 they reach under the seat of the car, pull out a
11 gun, take aim, shoot, kill. Intended to do it,
12 but certainly it was something that was done
13 very spontaneously, they didn't take long to
14 think it through. It was just you cut them off,
15 they get mad, reach for the gun and shoot. I
16 am suggesting that that is an intentional
17 murder.

18 MR. STAFFORD: I object, Your Honor. I
19 suggest that is involuntary manslaughter. He
20 acts out of passion. Could be.

21 THE COURT: Rephrase it, please.

22 MS. DAVIES: Well, actually, Mr.
23 Stafford, I think that is an interesting
24 notion.

25 And actually it would be for a jury to

1 decide under those circumstances whether it
2 would be reasonable for a person to get so angry
3 to react in such a way in response to being cut
4 off on the freeway. But let's assume that a
5 jury rejected that notion and they didn't think
6 that was a reasonable response in the
7 circumstances. Focusing on the intent because
8 even if you were a jury of people who thought it
9 was reasonable to get so angry as to kill, it
10 still is an intentional murder. That is a part
11 of the voluntary manslaughter scheme. So
12 focusing on whether it's intentional or not. Is
13 there anybody who disagrees with the notion that
14 you could form the intent to kill that quickly?
15 Okay.

16 Kinds of evidence. We have done this
17 so many times I can't remember whether I heard
18 the judge say this today, frankly, or whether he
19 said it another day.

20 THE COURT: He didn't. I know what
21 you are going to say.

22 MS. DAVIES: About witnesses and
23 evidence. I apologize. It begins to all run
24 together. Types of evidence. I think a lot of
25 time people think of evidence as bullets and

1 guns and fingerprints and things you can touch
2 and feel. Witnesses who come in to testify,
3 the words, their testimony, that is evidence.
4 And as simple and obvious as that seems, I like
5 to mention it because I think people sometimes
6 don't realize that. That is evidence. It's the
7 most typical, the most common kind of evidence
8 you have. Citizens like you and me who come in
9 and under oath tell you what they saw or heard
10 or know about a case. And that is the jury's
11 job, to decide what is believable. If during
12 lunch, when you were out, if there had been an
13 automobile accident out on the corner and there
14 had been a witness, four witnesses, one on each
15 of the four corners viewing that accident, and
16 they came up here immediately after lunch and
17 told you about what they saw, would it surprise
18 anybody to think there may be some discrepancies
19 or differences in the way they reported what
20 they saw? Anybody expect everybody to have
21 exactly the same version of what happened?

22 THE PROSPECTIVE JUROR: No.

23 MS. DAVIES: Why?

24 THE PROSPECTIVE JUROR: Four different
25 corners.

1 MS. DAVIES: Right. Different
2 perspectives. They are seeing it from different
3 angles. Maybe one of them blinked at the wrong
4 moment, turned aside, maybe one had better
5 eyesight than the other. What? Maybe one is
6 more articulate than another. One is better
7 able to come in and describe what they saw or
8 has a better memory. And these are all the
9 kinds of things that a jury can take into
10 account when they are deciding which of the
11 witnesses is the most believable. What if one
12 of those witnesses happened to be the brother
13 or the father of the driver of one of the cars
14 in the accident? May be more inclined to favor
15 one version or another or if it would help
16 someone they are related to. Those are the kind
17 of things that a jury could consider in deciding
18 which of those people to believe.

19 So you are in the business, if you are
20 on the jury, of resolving the conflicts,
21 deciding what fit with the other evidence. You
22 know, one of them might have told you it was a
23 maroon car and you looked at the pictures of the
24 accident, you say there is not a maroon car
25 here. There is a brown car or there is a red

1 car. I mean, partly it's visual perception and
2 the names that people use. But if there is a
3 blue car and a red car and somebody is talking
4 about maroon car, you might be able to fit that
5 together. Do you see what I mean by resolving
6 conflicts? Anybody who feels like they
7 couldn't resolve conflicts in testimony, though,
8 that they couldn't make that kind of decision?
9 Anyone at all? Because it is very difficult for
10 some people to do that, and we don't want to put
11 you in that position if you feel like you
12 couldn't do that.

13 Sometimes we don't have a problem with
14 conflicts because there is only one witness.
15 The law says that we can get a conviction based
16 on the testimony of just one witness. Now,
17 obviously, a jury of twelve people is going to
18 have to be convinced beyond a reasonable doubt
19 that they believe that witness and that that
20 witness' testimony is enough to prove up the
21 case. We are talking about capital murder here,
22 though. Is there anyone who feels like they
23 simply could not ever convict based on the
24 testimony of just one witness? Assuming, of
25 course, that you believe that witness beyond a

1 reasonable doubt. Anyone who feels that way?
2 No? Either you are sleeping or -- I mean, I
3 have never had a group that nobody answered to
4 this. Think about that a minute. I am going to
5 be asking you to find somebody guilty of capital
6 murder and I am going to be asking for the death
7 penalty and I am telling you that that could be
8 done based on the testimony of just one witness
9 if you believe that witness. Anyone who thinks
10 that just isn't right, you couldn't do that?
11 Okay.

12 Did I see you shaking your head back
13 there? Is it Ms. Wright?

14 THE PROSPECTIVE JUROR: Yes.

15 MS. DAVIES: Do you feel like that
16 would be okay?

17 THE PROSPECTIVE JUROR: If I was
18 convinced that they were really telling the
19 truth.

20 MS. DAVIES: Absolutely. That is a
21 part of it. Any witness you hear, you can
22 believe all, none or part because sometimes,
23 it's just like we were talking about where there
24 are four witnesses, one of the witnesses may
25 have blinked and they may be mistaken about one

1 thing they tell you about, but 90 percent of
2 what they are telling you may be absolutely
3 true. You would have to put it together.

4 Kinds of witnesses. The judge
5 touched on this when he talked about -- what did
6 he say? Police officers. Status basically is
7 what we are talking about. Status, the uniform,
8 a title. Do you feel like you are going to
9 automatically believe or automatically
10 disbelieve a police officer? Anyone who feels
11 that way? Never going to believe a police
12 officer or always? Or never believe a doctor,
13 always believe a doctor. Anyone feel that way?
14 The idea is wait and hear what they have to say
15 before you decide, you know. You can always
16 consider a person's special training and
17 expertise if it has something to do with what
18 they are testifying about, and you know, that
19 may or may not be beneficial.

20 Believing all or part applies, all or
21 part of a witness' testimony, applies in another
22 area, too. In some instances, even though the
23 defendant has the right to remain silent and may
24 not testify, in some instances you would hear
25 evidence in the form of a statement that a

1 defendant gave to the police. Do you feel like
2 if a defendant spoke to the police and gave a
3 written statement that he is always going to be
4 totally honest with the police? Do you think
5 there is a chance some of it may be self-serving
6 if he talks to the police? Any reaction there?

7 THE PROSPECTIVE JUROR: I would have
8 to hear the statement.

9 MS. DAVIES: The point to that is, I
10 mean you can believe all or part or none of a
11 statement, just like you could of any witness.
12 Does that seem appropriate?

13 There is a rule of evidence if I offer
14 a defendant's statement into evidence I can
15 delete certain portions if I choose to do so for
16 whatever strategy. It can relate to this notion
17 of the ability to believe all or part of
18 anything. So if I offered a statement and I
19 deleted certain parts of it, you would know it.
20 It's not like there would be portions excised
21 and you would never know. It would be made
22 clear -- I am offering this statement with the
23 exception of the last paragraph. Anybody's
24 first reaction is that they are highly offended
25 at that notion? They would think that was wrong

1 for me to do that. Ms. Polk.

2 THE PROSPECTIVE JUROR: Yes.

3 MS. DAVIES: Ms. Polk is being real
4 honest. There are usually a number of people.
5 What is your feeling there?

6 THE PROSPECTIVE JUROR: Something
7 could be taken out of context from the entire
8 statement that was given.

9 MS. DAVIES: Well, and you would know
10 that. It's not like it would be done -- I would
11 be telling you, or the witness would make clear
12 certain things have been left out here. You
13 would know that. And that would bother you?

14 THE PROSPECTIVE JUROR: You would know
15 what was left out also?

16 MS. DAVIES: Well, we will get to
17 that. One step at a time. Yes, the answer is
18 yes. But the idea that I might offer a
19 statement but leave out certain words or
20 sentences, would that offend anybody?

21 THE PROSPECTIVE JUROR: Sure.

22 MS. DAVIES: Well, would it make a
23 difference -- you are Mr. Ketchie?

24 THE PROSPECTIVE JUROR: Yes.

25 MS. DAVIES: The other part of the

1 rule that would permit me to do that also makes
2 very clear that if I do leave out part, and the
3 jury would know it, the defense immediately has
4 the right to offer what I left out. So it's
5 like, okay, this has to be fair, folks, rule.
6 Yeah, you don't have to offer it all. It's for
7 trial strategy, whatever strategy that I may
8 have in presenting my case that I don't want to
9 be the one who offers this particular bit of
10 evidence. The judge, both sides, the jury all
11 know that the defense, if they want the jury to
12 hear it and they think it would benefit their
13 case, they immediately can offer that, too. So
14 nothing is taken, you know, meaning it can't be
15 distorted or whatever. Does that make a
16 difference to you? What about you?

17 THE PROSPECTIVE JUROR: Yes, as long
18 as you have some chance, either side has a
19 chance to do it.

20 MS. DAVIES: Oh, absolutely. I want
21 you to understand how the rule works. In other
22 words, if I did that, would you hold it against
23 me or be angry with me if I did it?

24 THE PROSPECTIVE JUROR: No, I wouldn't
25 think so.

1 MS. DAVIES: Because you know the
2 defense has the right to put the rest in if they
3 want to.

4 THE PROSPECTIVE JUROR: Yes.

5 MS. DAVIES: Is that okay with you?

6 THE PROSPECTIVE JUROR: Yes.

7 MS. DAVIES: Another thing that can
8 come up in any criminal case where there is a
9 statement of the defendant offered into evidence
10 has to do with whether his statement was given
11 voluntarily. There are a number of requirements
12 under the law that the police must conform with
13 to be sure that a statement is given
14 voluntarily. Anybody ever heard of Miranda
15 warnings? If anybody watches TV -- you have the
16 right to have an attorney. You have the right
17 to remain silent. Anything you say will be
18 used against you in court. Et cetera, et
19 cetera. These are requirements under the
20 constitution and they are also requirements
21 under our state law. Anytime a statement of a
22 defendant is offered into evidence you may very
23 well get a charge from the judge at the
24 conclusion of the trial that tells you -- and
25 remember, this has to do with a statement that

1 was offered. You have read it. You have seen
2 it. You know what is in it. The judge then at
3 the end of the trial will tell you: Now, jury,
4 this is one of those rare situations where you
5 get to decide whether that statement should be
6 used as evidence. You have got to be convinced
7 that it was given voluntarily. Now, I mean,
8 one kind of situation might be you might hear --
9 again I am going to use an extreme example, but
10 you could hear testimony from a police officer
11 who gets up there and tells you: Well, we
12 tortured this man for a week before we got his
13 statement. You might very well conclude under
14 circumstances like that this was not really
15 voluntary. On the other hand, the judge is
16 also going to tell you that all those Miranda
17 warnings have to be given, and he will set them
18 out for you, he will list them one, two, three,
19 four, five. Every one of them has to be given.
20 You could have a situation where you have heard
21 a rookie cop testify and say: Well, I didn't
22 have my card with me, I couldn't remember, and I
23 didn't tell him all those warnings or I left out
24 one of them or whatever. If you were in a
25 situation where you had heard evidence and you

1 are not convinced that it was voluntary, the
2 judge will tell you you have got to disregard
3 that statement that you heard. In other words,
4 it's kind of like unringing a bell. There is
5 no erase button in your brain. It's not a
6 matter that you can forget it. And nobody is
7 suggesting that you can forget. But you would
8 have to go through a process of mental
9 discipline. If you had heard evidence and you
10 are not convinced that it's voluntary, you would
11 have to throw it out, look at the rest of the
12 evidence and decide without that statement is
13 there enough other evidence to convict this
14 person. Of course, if there is enough other
15 evidence and you are convinced by that other
16 evidence beyond a reasonable doubt, you could
17 find the person guilty. However, if it's a
18 situation where you have heard evidence and you
19 are convinced that it's not voluntary, that you
20 must disregard that statement, you would throw
21 it out, you look at the rest of the evidence
22 and, hey, this is a tough situation. Maybe
23 there is not enough evidence there. Maybe
24 there is no other evidence there. Let's use the
25 most extreme example. The only evidence I have

1 brought you was his statement. So, obviously,
2 if you decide it wasn't voluntary and you throw
3 it out, you would be in a situation of, once you
4 disregarded it, of looking over here, there is
5 no other evidence on the table. You would have
6 to find him not guilty. It would be difficult
7 under a situation where you have read a
8 statement that maybe confesses his guilt. But
9 that is exactly what the judge will tell you
10 that you have to do if you were presented with
11 that kind of situation. It would be each
12 individual juror's decision in their own mind
13 whether it was voluntary and whether they should
14 consider that statement. Can each of you do
15 that? Can you follow that instruction? I need
16 for you to be sure that you can. You know, in a
17 situation like that, it may be that twelve
18 jurors would look at it, if it's not a clear-cut
19 fact situation, one juror may think it was
20 voluntary and consider the statement, another
21 juror may think, no, it wasn't voluntary, I am
22 not going to consider the statement, but look at
23 the rest of the evidence, and I don't think
24 there is enough evidence otherwise. It's a
25 really tough one, that extreme situation where

1 there is no other evidence at all, and in that
2 situation you would have to find not guilty.
3 Okay?

4 THE COURT: Ms. Davies.

5 (Off the record bench conference)

6 THE COURT: Ladies and gentlemen, we
7 are going to take about ten minutes for a
8 break. The snack shop on the first floor is
9 still open in case you need to get some kind of
10 caffeine fix down there. The restrooms are on
11 this floor. Let's take ten or fifteen minutes.

12 (Recess; after which, the following
13 proceedings were had:)

14 MS. DAVIES: I was really nearly
15 through. I am sure y'all are glad for the
16 break, anyway.

17 A couple of things I do want to touch
18 on. From looking over your questionnaires, I
19 know that a number of you expressed concern
20 about early release. I think the judge has
21 already mentioned to you that parole, early
22 parole is something that you cannot consider in
23 reaching your verdict in deciding punishment.
24 It's something that is outside our control. So,
25 if you have a strong feeling about that, it's

1 something that you would have to deal with with
2 your legislator, through some other part, make
3 some changes some other way. My main concern is
4 to be sure that each of you would, despite any
5 feelings that you might have, that you would
6 follow the judge's instruction and not let those
7 feelings interfere or influence your decision in
8 sentencing in this case or in any case. Can you
9 follow those instructions? Assure us that you
10 can do that. Okay.

11 One of the other things that, I mean,
12 the judge and I both have touched on a number of
13 the protections that any defendant has when they
14 come in here in the courtroom, and one of them
15 is that presumption of innocence. It doesn't
16 mean he didn't do it. It means that he has a
17 protective bubble around him at this point. I
18 have got to bring evidence to the courtroom to
19 convince the jury beyond a reasonable doubt.
20 Once I have brought evidence to court, that
21 bubble bursts, once you are convinced beyond a
22 reasonable doubt of guilt. But as you sit there
23 right now, the bubble is still in place. We
24 need to be sure that each of you will respect
25 that constitutional right and presume him to be

1 innocent at this point prior to hearing any
2 evidence. Can you do that?

3 As I said at the beginning, I am going
4 to save all -- you know, it's a two stage trial,
5 and the second stage of trial is where you deal
6 with these questions that determines whether or
7 not a death penalty is given. I am going to
8 save most of my conversation in that regard to
9 when we talk individually. But as you sit here
10 right now today, I do want to know one thing,
11 and that is whether there is anyone here who
12 knows already that they could never ever be a
13 part of a jury that gave the death penalty. I
14 know a couple of you answered that questionnaire
15 to suggest that that is the way you feel. Is
16 there anyone who feels like they simply could
17 not personally participate in a verdict that was
18 going to result in the death penalty? Anyone
19 feel that way? Does anybody have any questions
20 of me? Thank you.

1 VOIR DIRE EXAMINATION BY THE DEFENSE

2 BY MR. STAFFORD:

3 May it please the court.

4 How many of y'all want me to talk for
5 an hour? Nobody. Hurt my feelings to the
6 bone.

7 Mondays are often difficult times for
8 us lawyers, I think. If you are as tired as I
9 am, for example, you are tired to the bone. I
10 think often we spend the whole weekend doing our
11 honey-do's around the house and then, come
12 Monday morning, as jurors, you have other things
13 on your mind, such as what I didn't get
14 accomplished over the weekend or what is waiting
15 for me at work or where I need to go. So, I
16 realize that it's kind of difficult. And I have
17 been doing this for fifteen years, and I hate
18 Monday morning jurors. No offense against you
19 personally. You are so preoccupied by other
20 things, it's kind of hard to get y'all livened
21 up and let loose, let your hair down. Let me
22 suggest something to you. A lot of you have
23 never been into a courtroom before. I think
24 when you come here you see -- this courtroom
25 doesn't have -- but normally you have the

1 American and state flag and you see a judge, and
2 judges are people that, you know, from birth we
3 are taught to respect and we are taught to put
4 them up on a pedestal up here and whatever they
5 say we take as gospel. You hear of the
6 prosecutor. You are programmed from birth,
7 when you start watching television, that
8 prosecutors uphold the law, they do good and
9 they wear the white hat and they do all of this.
10 I know that you are programmed from your
11 television that defense lawyers are a bunch of
12 slime balls who go around and get horrible
13 people off for crimes that they have committed.
14 We all have these preconceived ideas. So what
15 I really want -- I am not going to waste my time
16 or waste your time going through a litany of
17 things whether or not you can keep an open mind
18 or whether or not you will keep an open mind.
19 Sometimes I feel like we almost give you such a
20 pep talk and a pep rally that you could almost
21 walk out with the American flag and say I am a
22 law-abiding citizen and I am going to uphold the
23 law and yea, yea, yea. It's kind of like a pep
24 rally up here. Really, what we are trying to
25 accomplish is real simply put. I am going to

1 be just as up front with you as you would be up
2 front with me if I was sitting on your living
3 room couch in your house because that is when
4 your guards are down and that is when you are
5 going to tell it like it is. There ain't going
6 to be any beating around the bush or you are
7 afraid of the prosecutor, you are going to tell
8 me what is down here and how you feel about
9 things. That is what you are going to tell
10 me. That is what we want. If we could, when
11 you come back on voir dire, individual voir
12 dire, try to relax, try to assume you are in the
13 confines of your home and also try to be just as
14 honest and candid with us as you possibly can.
15 Because I promise you, if I had everyone of you
16 raise your hand, everyone of you will tell me
17 you will be fair. Well, what we have found the
18 last fifteen or twenty years of jury selection
19 is people want to be fair. And what makes
20 jurors defensive, we all have defensive
21 mechanisms about ourselves, and one of the first
22 things that makes jurors defensive is when
23 someone suggests to them that they couldn't be
24 fair and follow the law. You will say
25 pointblank yes I will keep an open mind and I am

1 going to be fair, when we really haven't
2 discovered how you feel about anything or how
3 you feel about the death penalty or how you feel
4 about someone not testifying because we all know
5 when we come in to make a decision where the
6 discretion is yours, you are the discretionary
7 person who has to make the decision, what we
8 know and you know, when you are truthful to
9 yourself, is what you believe and what you think
10 and your biases and prejudices, that is what is
11 going to regulate how you vote. The law will be
12 given to you, but there is a lot of us that have
13 such strong opinions and gut reactions about
14 certain laws that it will affect you when it
15 comes to decision making time. And as you know
16 -- and when y'all go back home tonight and what
17 I want you to know about, this is not
18 television. This is not -- this is not a dress
19 rehearsal, because the way you feel and believe
20 is going to determine whether my client lives or
21 dies. We are that close. And your attitudes
22 and your thoughts. So when you come back,
23 because often I think what we have covered is
24 whether or not you can follow the law. Again,
25 everybody wants to follow the law. Everybody

1 wants to say yes, I am a law-abiding citizen or
2 I wouldn't be here. But it takes often more
3 courage and more stamina and more backbone to
4 stand up and say I disagree with that law, which
5 is nothing wrong with that. You have the right
6 to say that. It takes more courage and shows
7 you a much better of a person to say I don't
8 like that law, it's going to influence my
9 decision, et cetera, et cetera. If you feel
10 that way, you are entitled to let us know that.
11 True, you may keep an open mind. True, you
12 will want to follow the law if you are in that
13 situation; but, true, you know you didn't fall
14 off the turnip truck last night, and you may
15 have been born at night but you know your
16 attitudes and your philosophies will affect how
17 you approach things. And the hypothets often
18 are misleading that we give you because the
19 ultimate decision and what we really I think
20 every one of you have kind of soaked into, what
21 we are dealing with here is a capital murder
22 case. That means my client has been charged
23 with capital murder. And if he is found guilty,
24 there is only two possible punishments, life or
25 death. We need to know your attitudes. There

1 is a bunch of jurors who believe once I have
2 passed that hurdle, once I find someone guilty
3 of intentionally taking someone's life, there is
4 not a doubt in my mind that he did that, there
5 is only one punishment in my mind that I feel
6 like is justifiable, and that is death. He took
7 somebody else's life, he took two people's lives
8 or he killed a police officer or he took a life
9 during a burglary, in my opinion there is only
10 one just punishment. That is death. We need to
11 know that. Don't feel guilty by feeling that
12 way. That is why we are the country that we
13 are. That is why we have Reganomics and
14 Bushanomics, I guess, and if we Democrats are
15 lucky we are going to have a little
16 Arkansasanomics.

17 Also, on the hypothet as far as lesser
18 includeds. You have to understand we are not
19 going to be dealing with a husband who pulls the
20 plug on somebody's wife. We are dealing with
21 someone who is charged with capital murder and
22 something comes up within that case that would
23 give you the benefit of determining whether or
24 not he is guilty of murder versus capital
25 murder. Because it may be in a situation where

1 if it was a burglary/murder you may, after
2 examining the evidence, say, yes, it was an
3 intentional murder, it was an unjustifiable
4 killing, but there is no evidence to convince me
5 beyond a reasonable doubt that there was a
6 burglary. He didn't go in there with the intent
7 to commit burglary. It could be numerous
8 things. He didn't go in there with any intent
9 to kill, any kind of felony. So when we talk
10 about low end versus the high end, you have to
11 remember you are coming from the high down to
12 the next level. We are not asking you what you
13 would do in a situation because, that is not the
14 kind of case we are dealing with. Same way,
15 capital murder case, I am trying to save my
16 life, I don't take the stand and testify. Some
17 jurors feel like: Hey, pardner, in a close
18 case, when your life is on the line, we expect
19 to hear from you. And if it's a close case, I
20 am going to go with the State because you didn't
21 testify because I ain't going to give you the
22 benefit of the doubt. Nothing wrong with
23 feeling that way. You have the right to feel
24 that way. But if you are a defense lawyer, sure
25 would be glad to know that if you didn't put

1 your client on the stand. Those are the things
2 I want you to level with us and tell us about.

3 And, also, another thing is the burden
4 of proof. We kind of skate on that every now
5 and then, but I think all of us have the
6 intelligence to realize, especially you history
7 buffs know that our government has always placed
8 the burden on the state or the government to
9 prove beyond a reasonable doubt that the people
10 did what the state or the government said you
11 did. Just because a prosecutor or an assistant
12 U. S. Attorney says something ain't so doesn't
13 mean it ain't so. Just because U. S. Attorney
14 thinks something is a lie doesn't mean it's a
15 lie. They have to offer you some sort of
16 physical, whether from the witness stand,
17 whether it's some sort of documentation or some
18 sort of evidence to support their theory because
19 basically Our Honor will tell you that what I
20 say and what a prosecutor says is not evidence.
21 The only evidence there is is what you hear from
22 the witness stand. And you judge that evidence
23 and give it whatever weight you want to. Just
24 because I say something is a lie doesn't mean
25 it's a lie and vice versa. We have to prove it

1 to you that it's a lie or offer some sort of
2 alternative theory through the witness stand.

3 MS. DAVIES: Your Honor, the jury
4 decides what is credible in terms of evidence.

5 MR. STAFFORD: By all means. That is
6 your role.

7 MS. DAVIES: I object to suggesting
8 there has to be evidence offered as to the truth
9 or veracity of any particular witness.

10 THE COURT: Sustained.

11 MR. STAFFORD: I am suggesting that
12 the burden of proof is on the State. And often
13 the government doesn't like something that is
14 introduced, so they suggest to you that it's a
15 lie, when there is no iota of evidence to
16 support that. The only basis that serves the
17 premise that it's a lie is the government or the
18 state prosecutor's statement it's a lie. There
19 is nothing else to justify it. My point is
20 that doesn't necessarily mean it's a lie. That
21 is not a lie until they prove to you beyond a
22 reasonable doubt through the witness stand that
23 it is a lie. Okay?

24 MS. DAVIES: Your Honor, I have to
25 object to the way this is being presented. The

1 jury decides on the credibility of the witness
2 based on that witness' testimony, not on what I
3 say about the witness or what the defense says
4 about the witness, and neither of us have to
5 prove--

6 THE COURT: I am going to remind you,
7 ladies and gentlemen, probably for the first of
8 many times, that nothing the attorneys are
9 telling you is evidence in this case, not when
10 they are talking to you now or giving opening
11 statements or arguing the case to you. The
12 evidence is going to come on what I am going to
13 allow in through testimony from the witnesses'
14 testimony on the witness stand. And you do
15 individually determine credibility of every
16 witness who testifies.

17 Proceed, please.

18 MR. STAFFORD: Thank you, Judge.

19 Actually that is all I am going to
20 say. I am through. I would like to spend my
21 time with you when you come back on individual
22 basis. I hope we can share our respective
23 attitudes. I don't want you to be put on a
24 guilt trip by expressing yourself or how you
25 feel, that there is something wrong with that.

1 If you don't think you can follow a particular
2 point of law, don't feel threatened or feel bad
3 about that. You have the right to express what
4 you want to express. I thank you.

5 THE COURT: Ladies and gentlemen, I
6 ask you to step out into the hallway. We will
7 probably be back with you within the next ten
8 minutes or so to let you know when you are
9 coming back.

10 (The panel of prospective jurors
11 leaves the courtroom)

12 THE COURT: It's my understanding that
13 by agreement of all parties the following
14 prospective jurors are being excused:
15 Prospective juror number one on panel number
16 five, Ms. Keys; number five, Ms. Sparks; number
17 seven, Ms. Tennebaum; number eight, Mr. White;
18 number twelve, Mr. Gafrick; and number sixteen,
19 Mr. Ratcliff.

20 Is that your agreement, Ms. Davies?

21 MS. DAVIES: It is.

22 THE COURT: And yours, Mr. Stafford?

23 MR. STAFFORD: Yes.

24 THE COURT: Yours, Mr. Rhoades?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: Bring them in.

2 (Jurors enter the courtroom)

3 THE COURT: Ladies and gentlemen, six
4 of you aren't coming back to visit with us.
5 This gentleman is passing out slips right now.
6 As I call out your name, the following people
7 may be excused. Number one, Ms. Keys; number
8 five, Ms. Sparks; number seven, Ms. Tennebaum;
9 number eight, Mr. White; number twelve, Mr.
10 Gafrick; number sixteen, Mr. Ratcliff. Thank
11 you for coming.

12 Mr. Drury has not been excused.

13 THE COURT: For the remainder of you,
14 you have some slips or are about to get some
15 slips that have days and times for you to be
16 back here. Go ahead and pass those out, and I
17 will confirm. You are not to leave yet. I have
18 to give you some additional instructions.

19 Number two, Ms. Polk, at 9:30
20 tomorrow, Tuesday. Number three, Mr. Ritch,
21 tomorrow morning at 9:30 also. Ms. Bruckler,
22 number four, tomorrow at one p.m. Mr. Drury,
23 number six, tomorrow at 1:00 p.m. Mr. Ketchie,
24 tomorrow at two p.m. On Wednesday morning,
25 there is only going to be one person, Mr. Davis,

1 at 9:30. Mr. Raeburn Davis at 9:30. Mr.
2 Curtis Ray Davis is at 1:15 on Wednesday. Also
3 Wednesday at 1:15 Mr. Y'Barbo. At 2:30
4 Wednesday, Mr. Vervalin. Thursday morning at
5 9:30, Ms. Ackerman and Mr. Luce. Thursday at
6 1:00 p.m. Ms. Gray and Mr. Garcia. At 2 p.m.
7 Thursday, Ms. Wright. On Friday at 9:30 Ms.
8 Adams and Mr. Brooks.

9 Those slips y'all have have the same
10 information. Anybody have anything different?

11 The previous admonitions are still in
12 effect, that is, you are not to discuss this
13 case among yourselves or with anyone else
14 including spouses. You are not to discuss
15 anything on the questionnaire. I realize you
16 have to tell your spouses and employers that you
17 are down here for selection on a capital murder
18 case. Again, don't let them impart any
19 information or misinformation to you regarding
20 murder, capital murder or how they think the
21 system works or doesn't work or anything else.
22 The attorneys have been instructed not to engage
23 you in conversation. If they see you in the
24 hallway or in the elevators, they are not going
25 to be talking to you, but they may nod in

1 recognition, nod hello, that kind of thing. If
2 anybody attempts to talk to you about the case,
3 bring it to our attention immediately. Tell me,
4 tell the clerk, tell the bailiff who has you in
5 charge. I don't anticipate you are going to see
6 anything in the media regarding this case.
7 They commonly don't cover these cases until the
8 case is at least in trial. Don't make any kind
9 of independent investigation. That is to say
10 don't go read any law you think might apply in
11 this case. Do not attempt to find out exactly
12 which case it is we are trying. When you come
13 down, I don't care where you park as long as you
14 park where you retain your car keys. There are
15 some attendants who keep your car keys. Don't
16 do that. Move to another parking lot where you
17 retain your own car keys.

18 Any requested instructions, Mr.
19 Stafford?

20 MR. STAFFORD: Other than possibly
21 advise the jurors that they may have long waits.

22 THE COURT: Ms. Davies?

23 MS. DAVIES: That is all.

24 THE COURT: You may well have some
25 long waits. If you are called down for the

1 morning session, it hasn't been unusual for the
2 second person, if we really get active with the
3 first one, not to be called to the stand until
4 eleven o'clock or even after. Bring reading
5 material, newspapers, magazines, books. When
6 you come back, you don't have to wait in the
7 hallway. We want you to have a seat in the
8 anteroom out here. The doors will normally be
9 closed if we are in progress. You can go in
10 there and have a seat. You can sit there and
11 read. You can bring candy or whatever you
12 need, cokes, coffee. Sometimes you will be
13 seated for a long time. As I said earlier, at
14 the end of the session we will let you know
15 whether or not you have been selected to serve
16 as a juror in the case. If you are not selected
17 to serve, we will excuse you for all purposes.
18 If you are selected to serve as a juror, we will
19 give you some additional instructions at that
20 time.

21 Any questions at the moment?

22 You come back to this room, not to our
23 courtroom but to this room.

24 Anybody have any questions about the
25 times you are supposed to be here? If there is

1 nothing else, you are excused until your
2 assigned times and days.

3 Ms. Polk and Mr. Ritch, we will see
4 you tomorrow at 9:30.